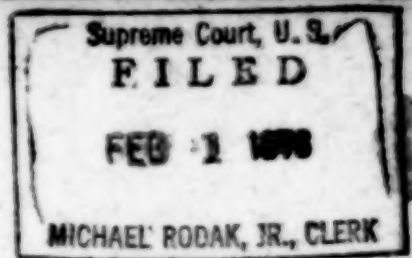


No. 77-656



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# In the Supreme Court of the United States

OCTOBER TERM, 1977

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INTERNATIONAL ASSOCIATION OF MACHINISTS AND  
AEROSPACE WORKERS, AFL-CIO, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,  
ET AL.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION IN OPPOSITION

---

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(1)

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 560 F. 2d 224. The supplemental opinion (Pet. App. A20-A21) is not officially reported. The order of the district court after remand from the court of appeals (Pet. App. A26-A27) is not reported.

**JURISDICTION**

The judgment of the court of appeals was entered on June 28, 1977, and rehearing was denied on July

28, 1977. The petition for a writ of certiorari was filed on October 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### QUESTION PRESENTED

Whether petitioner, who claims that provisions of a consent decree are inconsistent with this Court's decision last term in *International Brotherhood of Teamsters v. United States*, should first seek relief in the district court in light of the court of appeals' opinion holding that "the district court is free to fashion another remedy so long as that remedy is consistent both with *Teamsters* generally and with the gloss our opinion puts on the Supreme Court's opinion."

#### STATEMENT

This action was commenced by the Attorney General in April 1973 alleging that United Airlines violated Title VII of the Civil Rights Act of 1964 by engaging in discriminatory recruitment, hiring, job assignment, and promotion practices, including the use of non-job related tests and educational standards that adversely affected minorities. The complaint also alleged that the collective bargaining agreements, executed by United and the unions,<sup>1</sup> perpetuated United's discriminatory employment practices by requiring minorities and women to forfeit their accumulated seniority rights upon transfer to positions from which they previously had been excluded (Pet. App.

<sup>1</sup> In addition to petitioner, the complaint named the Airline Pilots Association (ALPA), the Airline Employees Association, and the Communications Workers of America.

A1-A2). The Equal Employment Opportunity Commission was substituted as plaintiff in 1974, pursuant to Section 707(d) of Title VII of the Civil Rights Act of 1964, as added, 86 Stat. 107, 42 U.S.C. (Supp. V) 2000e-6(d).

A trial was held and at the close of the presentation of the government's evidence,<sup>2</sup> United, the International Association of Machinists (IAM), and the Airline Pilots Association individually moved to dismiss the action under Rule 41(b), Fed. R. Civ. P., claiming that the government had failed to establish a *prima facie* case of Title VII discrimination (Pet. App. A2). In an oral opinion, delivered on September 16, 1975, the trial court held that the Commission had made a *prima facie* showing<sup>3</sup> and suggested that the parties attempted a settlement (Pet. App. A3).

Between September 1975, and April 30, 1976, the parties engaged in settlement negotiations, includ-

<sup>2</sup> The evidence adduced by the government showed that minority persons had been disproportionately assigned to low paying Group III positions (airplane cleaner and food service assistant) under the IAM contract. Educational and testing requirements prevented many minority employees from transferring. Under the IAM contract, an employee would lose his accumulated seniority for all purposes except vacation upon transfer from one basic job to another. Employees who transferred between non-union positions retained company seniority for purposes of layoff and recall. Women were mostly assigned to low paying clerical and some IAM Group III positions. They were virtually excluded from the best IAM jobs of mechanic and ramp service positions and storekeeper (Pet. App. A9).

<sup>3</sup> The court ruled, however, that the Commission had not established a *prima facie* case of discrimination against Asian Americans (Pet. App. A3).



ing meetings with the trial judge on at least four occasions. At the April 13, 1976 conference, in which the President of the IAM local union participated, all parties reached apparent agreement and the court set April 30, 1976, as the date when the consent decree would be entered (Pet. App. A3). However, on April 30, petitioner objected to the seniority adjustments in paragraph 1, Section VII of the proposed consent decree,\* although it waived its right to present additional evidence. After United and other unions agreed to be bound by the terms of the decree, the trial court struck the term "consent" and entered the decree as a final order (Pet. App. A4-A7).

The decree required United to engage in affirmative action to achieve employment goals for minorities and women in a broad range of job classifications. However, it provided for an award of a retroactive seniority date and back pay only for those minority individuals and women who could show that they had

\* Paragraph 1, Section VII provides (Pet. App. A22):

"1. All job classifications covered by the United-IAM Ramp and Stores, Food Services, Mechanic, Dispatchers and Guards Agreements, as well as those jobs covered by United's agreements with TWU and ALEA, shall henceforth be governed by company seniority for purposes of determining priorities in layoffs and recalls. Employees in promoted positions holding seniority under the Mechanic, Ramp and Stores, Food Services, Dispatcher and Guards Agreements or thereafter promoted to such positions shall, upon return to a position under one of the Agreements in which he holds seniority, be credited for the purposes of layoffs and recalls with a company seniority date equivalent to the seniority they held while in the promoted position pursuant to the seniority provisions of the collective bargaining agreements."

previously applied for, sought transfer to, or were dissuaded from applying for better positions (Pet. App. A23-A25). For those who could not meet this standard, but who were willing to move into previously closed jobs, paragraph I, Section VII of the decree provided that company seniority would govern as to layoffs and recalls only (Pet. App. A22). In an attempt to be fair to all parties (Pet. App. A14, the decree provided company seniority for lay-off and recall to all persons who transferred, including white males who had not been the subject of discrimination in initial assignment. In other respects the provisions of the collective bargaining agreement remained in effect.

On appeal, IAM argued that the district court abused its discretion by ordering the carry-over of company seniority for purposes of layoff and recall. The court of appeals held that "the district court was entitled to select company seniority for layoff and recall as the mechanism to provide redress" and that this "minor inroad on the prior collective bargain-minorities from the better IAM positions was an appropriate remedy (Pet. App. A11). The court noted that *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, did not preclude the award of this relief to non-applicants since transferees would for most purposes "start from the bottom of the [seniority] ladder," and their willingness to accept the loss of seniority benefits in order to transfer now was probative evidence that they would have trans-

ferred earlier if permitted (Pet. App. A13-A14). Finally, the court of appeals instructed the district court to modify the decree to comply with the holding in *Teamsters* that courts could not award retroactive seniority for discrimination prior to the effective date of Title VII (Pet. App. A16).

In responding to motions by both petitioners and the Commission,<sup>5</sup> the court of appeals held that precise application of *Teamsters* would have to be accomplished by the district court, where under Section 13 of the decree the parties "already have a forum with respect to *Teamsters*' bearing on particular aspects of the complicated scheme of relief awarded in this case'" (Pet. App. A19, n. 19). The court of appeals also supplemented its opinion to state that, if the appellate court's interpretation of *Teamsters* "create[s] a remedy which is alien to the purposes and intent of the consenting parties," the district court has the power to "fine-tune the remedy to conform to *Teamsters*" and that the trial court has the power to enter additional decrees which will "actually supersede the present decree" (Pet. App. A21).<sup>6</sup>

<sup>5</sup> The court had suggested (Pet. App. A17, n. 17) modifications of the decree with respect to those who had transferred after the lawsuit but before the decree; the Commission argued that those suggestions were inconsistent with other parts of the opinion.

<sup>6</sup> Pursuant to a joint motion of United and the Commission, the district court subsequently entered an order that established "[a] seniority date of July 1, 1965 for all employees who were initially hired by United prior to July 1, 1965 but did not enter the job classification in question until after July 1, 1965" (Pet. App. A26-A27). The IAM did not appeal but did successfully move to amend the decree to eliminate all pre-Title VII seniority adjustments awarded under the decree.

# ARGUMENT

Petitioner argues that the relief provided in Paragraph 1, Section VII of the decree is inconsistent with *International Brotherhood of Teamsters v. United States, supra*, and requests (Pet. 13) that this Court grant certiorari in order to remand this case to the district court "for further proceedings consistent with" the *Teamsters* opinion. We submit that the court of appeals correctly affirmed the district court's approval of the decree and that petitioner's contrary arguments (Pet. 9) are based upon a misunderstanding of the *Teamsters* opinion.<sup>7</sup>

<sup>7</sup> *Teamsters* did not preclude Title VII relief affecting bona fide seniority systems. *Teamsters* held only that the passive operation of a seniority system that was bona fide under Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(h), could not form the basis of a Title VII violation. The Court did not depart from its prior ruling in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 761-762, that "[t]here is no indication \* \* \* that section 703(h) was intended to modify or restrict relief otherwise appropriate" in a Title VII action "once an illegal discriminatory practice occurring after the effective date of the Act is proved." Similarly *Teamsters* does not preclude the limited seniority relief that the district court decided was necessary in order to correct unlawful post-Act discrimination. *Teamsters* held only that make whole relief could not be awarded to individuals who had not proven that they were actual or potential victims of discrimination, and further that this evidentiary burden was not satisfied by "[their current] willingness to accept the job security and bidding power afforded by retroactive seniority [for all purposes]" (431 U.S. at 371). Individuals claiming relief under a decree providing company wide seniority only for purposes of layoff and recall are not necessarily required to satisfy the same evidentiary burden in the same manner as those seeking more extensive relief. In any event, the *Teamsters*' opinion concluded that "[t]he question [whether non-applicants had proven that they were potential victims] is a factual one" (431 U.S. at 371, n. 58). The court of appeals' evidentiary judgment that under the peculiar facts of this case, in which non-applicant transferees "would have to start from the bottom of the ladder," the district court could find that the burden had been met, does not warrant further review.



In any event, the orders of the court of appeals provide petitioner with the remand relief it now seeks. The court of appeals made clear in both its initial and its supplemental opinion that petitioner and respondents could move to amend the decree in the district court in light of the supervening decision in *Teamsters*, and that the district court could alter the decree where it determined that application of *Teamsters* would depart from the intent of the consenting parties.<sup>9</sup> Since petitioner "already [has] a forum with respect to *Teamsters*," nothing would be gained by this Court's review of the court of appeals' decision prior to the district court's consideration of petitioner's contentions.

Petitioner apparently assumes that the district court's discretion to effect modifications in accordance with *Teamsters* is limited by the court of appeals' affirmance of the original decree, including the challenged provision of company-wide seniority for purposes of layoff and recall. However, the court of appeals' remand order states that "the district court is free to fashion another remedy so long as that remedy is consistent both with *Teamsters* generally and with the gloss our opinion puts on the Supreme Court's opinion" (Pet. App. A21). While the remand language is not without ambiguity, it need not be read to preclude modification of any decree provision that petitioner shows to be inconsistent with *Teamsters*, and petitioner's contrary speculation does not provide a sufficient basis for review by this Court.

<sup>9</sup> Thus the court of appeals did not usurp the fact-finding function of the district court (cf. Pet. 11-12).

Moreover, since the jurisdiction of the district court remains available under Section XIII of the decree (see Pet. App. A19), petitioner undoubtedly can resolve this speculation without any action by this Court. A district court decision favorable to petitioner might eliminate the need for further litigation. In any event, since the district court supervised the extensive pretrial discovery, heard more than two weeks of trial, and participated in the settlement negotiations which resulted in a consent decree between United and the Commission and an adjudicated decree against petitioner, it is certainly the appropriate forum for initial consideration of petitioner's modification claims. See *Hazelwood School District v. United States*, No. 76-255, decided June 27, 1977. Should the district court reject petitioner's modification motions, the avenue remains open for petitioner to pursue its claim in the court of appeals and if necessary by petition for a writ of certiorari in this Court. In light of the broad remand order of the court of appeals and its specific reference to conforming the decree to *Teamsters*, review by this Court in the present posture of the case would be premature.<sup>91</sup>

<sup>91</sup> Contrary to petitioner's contention, this case is not comparable to other cases in which this Court has granted a petition and vacated the court of appeals' decision in light of *Teamsters*. The petitions in *Detroit Edison Co. v. Equal Employment Opportunity Commission*, 431 U.S. 951, *Union Carbide Corp. v. Nance*, 431 U.S. 952, and *Western Gillette, Inc. v. Sabala*, 431 U.S. 951, were pending before the Court at the time *Teamsters* was decided. In each instance, the court of appeals' decision had approved seniority relief that was inconsistent with *Teamsters*. By contrast, in this case the court of appeals had the benefit of this Court's decision in *Teamsters* and it remanded to the district court with full authority to alter the decree to conform with that decision.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1978.